SENG HUP ELECTRIC CO. SDN. BHD.

v.

FAMILY EATERY SDN. BHD. & ANOR.

HIGH COURT, KUALA LUMPUR
DATO' LIM BENG CHOON J.
[SUIT NO. S7-22-756-1990]
29 JUNE 1992

INJUNCTION: Application to set aside interim injunction granted ex-parte - Whether there were serious questions to be tried - Whether balance of convenience was in favour of the plaintiff - Whether damages were an adequate remedy.

PRACTICE AND PROCEDURE: Application to strike out writ and statement of claim - Whether sustainable - O. 18 r. 19 of the Rules of the High Court 1980.

The plaintiff instituted this action against the defendants and prayed for specific performance of a tenancy agreement entered into between them and for an injunction to compel the defendants to deliver vacant possession and to restrain the defendants from letting, leasing or otherwise disposing of the said premises.

The plaintiff applied for and obtained an *ex-parte* interim injunction restraining the defendants from letting leasing or otherwise disposing of the said premises. The defendants applied to set aside the interim injunction and also to strike out this civil suit against the second defendant pursuant to O. 18 r. 19 of the Rules of the High Court 1980.

The defendants disputed the authenticity of the purported tenancy agreement produced by the plaintiff in support of its application. The defendants further contended that the said tenancy agreement was a doctored document exhibited to mislead the Court and claimed that it failed to depict the consensus of the parties and that there were serious departures from what the defendants have in fact agreed. The defendants exhibited what they claimed was the proper tenancy agreement formulated by the defendants' solicitors.

Held:

[1] The affidavit evidence adduced showed that the plaintiff had a reasonably good cause of action and there were serious questions which could only be answered after the trial of the substantive case.

[2] The plaintiff entered into the tenancy agreement because of the strategic location of the premises and damages were not an adequate remedy.

[3] The interim injunction granted to the plaintiff should not be revoked in order to maintain the *status quo* pending trial.

[Defendants' application dismissed with costs].

Cases referred to:

*Gan Realty Sdn. Bhd. & Ors. v. Nicholas [1969] 2 MLJ 110 (**refd**)*

*Yeap Mah Ee v. Kuan Kim Chiew & Anor. [1988] 2 MLJ 389 (**refd**)*

*Associated Tractors Sdn. Bhd. v. Chan Boon Beng & Anor. [1989] 2 CLJ 1197 / [1990] 2 MLJ 408 (**refd**)*

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19

For the plaintiff - P.S. Gill; M/s. Gill & Tang
For the defendants - Amir bin Nordin; M/s. Khairuddin, Ngiam & Tan

JUDGMENT

Lim Beng Choon J:

On 12 December 1990, the plaintiff, Seng Hup Electric Co. Sdn. Bhd., instituted this action against the first defendant, Family Eatery Sdn. Bhd. and the second defendant Datin Anna Lim Soon Loon. In their statement of claim the plaintiffs prayed for:

(a) specific performance of the tenancy agreement dated 31 October 1990 in respect of the renting of premises No. 44-4 Ground Floor and Mezzanine Floor Jalan Sultan Ismail Kuala Lumpur (the said premises) and

(b) an injunction to compel the defendant to deliver up vacant possession of the said premises forthwith and to restrain the defendants from letting, leasing or otherwise disposing the said premises.

On the same day the plaintiff also applied by summons-in-chambers (*ex parte*) for an interim injunction as prayed. Its application was heard *ex parte* on 20 December 1990 and this Court granted an interim injunction to restrain the defendants from letting, leasing or otherwise disposing the said premises with liberty for the defendants to set aside the said interim injunction.

On 23 January 1991 the defendants applied to set aside the interim injunction and also to strike out this civil suit against the second defendant pursuant to O. 18 r. 19 of the Rules of High Court 1980.

The plaintiff has filed three affidavits affirmed by its Director, one V. Jeyabalan (Jeyabalan) and an affidavit affirmed by its Administrative Manager one Jan Kong Yoke Lan (Jan) to support its case. In response thereto, the second defendant, on behalf of herself and in her capacity as the owner of the said premises, has also filed three affidavits affirmed by herself and another affidavit affirmed by the director of the first defendant's company, one Richard Chong Hon Min (Richard Chong) to support the joint defence of the two defendants. Although several issues have been raised in the respective affidavits, the paramount dispute is the authenticity of the purported tenancy agreement produced by Jeyabalan and annexed to his affidavit (see exhibit "JB-1" annexed to enclosure 2). It is not denied that prior to the making of the purported tenancy agreement, "JB-1", the second defendant had entered into negotiation with Jeyabalan and one Richard Teo, the chairman of the plaintiff company and certain terms of the tenancy appeared to have been agreed upon. However the defendants categorically denied that "JB-1" depicted the consensus of the parties and that there are serious departures from what the defendants have in fact agreed. It is also the defendants' contention that exhibit "JB-1" is a doctored document exhibited to mislead the Court. In support of these contentions, the second defendant produced what she claims is the proper tenancy agreement formulated by the defendants' solicitors M/s. Cheah & Teh. The tenancy agreement produced by her is exhibited as "ALSL-2" by annexing the same to her affidavit enclosure '9A'. Upon a careful scrutiny of both exhibits "JB-1" and "ALSL-2", I can at once say that it is not possible for this Court at this juncture to determine as to which one of the two exhibits is the authenticated tenancy agreement as alleged by the second defendant and I say so for these reasons. "JB-1" is dated 30 October 1990 and under clause 2 thereof, the vacant possession of the said premises was to be delivered to the plaintiff on or before 16 November 1990. In both the dates, the day and the month are expressed in writing and contrary to the defendants' submission, I cannot agree that simply because the day and month is in writing this fact by itself and without more could sufficiently show that "JB-1" is a doctored document or that the month of "November" written in clause 2 thereof was deliberately written by an unauthorised person to materially alter "the commencement date of the tenancy without the defendants' knowledge and consent." Apart from the bare words of the second defendant and the production by her of exhibit "ALSL-2", there is no evidence or at least sufficient evidence to sustain the contention of the defendants. Counsel for the defendants in his written submission argued that the original tenancy agreement duly executed by the second defendant has always been kept by the defendants' solicitors namely M/s. Cheah & Teh and was never handed to the plaintiff. However that may be it is to my mind extremely important to note that the signature of whoever signed for and on behalf of the first defendant company appear to me, at least at this summary stage, to be the same as the signature appearing in "ALSL-2" which signature the second defendant claimed to be hers when she signed "ALSL-2" for and on behalf of the first defendant company. Furthermore the Administrative Manager of the plaintiff, Cik Jan, in her affidavit (enclosure 15) asserted that she rang up the second defendant on or about 25 or 27 August 1990 regarding the tenancy agreement and thereafter "her son Richard delivered a copy of the Tenancy Agreement which had been signed by the second defendant." Cik Jan then made a copy of the tenancy agreement for record purposes and hence it was produced as an exhibit "JB-1". Furthermore Richard Chong, the Director of the first defendant, in his affidavit annexed to enclosure 17, confirmed that he in fact handed a copy of the original tenancy agreement to Cik Jan albeit he claimed that the copy made by him was a photostat copy of "ALSL-2". More importantly, however, is that although the second defendant kept insisting that "ALSL-2" had at all material times been under the custody of her solicitors, M/s. Cheah & Teh and was never handed to the plaintiff and/or its representatives, nevertheless no one from M/s. Cheah & Teh has filed an affidavit to substantiate her contention. In the circumstances it is certainly impossible for this court to sustain the allegations made by the second defendant. The matter can only be settled at the trial of this case.

Flowing from the abovementioned finding, it is likewise clear that whether the defendants were right in terminating the tenancy agreement on 31 October 1990 well before the expiry of the date of 16 November 1990 as stipulated in "JB-1" for the handing over of vacant possession of the said premises cannot likewise be settled at this summary stage. In this connection it is to be noted that the plaintiff had through its solicitors forwarded the remaining sum of RM50,000 and the requisite rental deposit on 31 October 1990. The defendants had, however, refused to accept

the same and instead terminated the tenancy agreement on 30 October 1990 on the ground that the plaintiff failed to execute the tenancy agreement on or before 16 October 1990 which is expressed in "ALSL-2" as the date for the handing over of vacant possession to the plaintiff.

Another point worthy of mention is that the second defendant in her affidavit affirmed on 23 January 1991 (enclosure 9A) said that in the course of negotiation she had indicated that she would agree to give consent to the first defendant to let the said premises to the plaintiff on a sub-tenancy basis provided that the plaintiff agreed to pay her RM100,000 as an inducement for her consent to sublet the said premises to the plaintiff. She also asserted in the affidavit that she also informed the representatives of the plaintiff in the course of the negotiation that the plaintiff must in addition pay a sum of RM50,000 as compensation for the fixtures and fittings installed in the said premises. According to her the plaintiff agreed to the conditions laid down by her the and plaintiff was supposed to pay the RM100,000 in one lump sum. But on 9 August 1990 the plaintiff only paid a sum of RM50,000 and agreed to pay the remaining sum on or before 16 October 1990. On the other hand the plaintiff in its statement of claim as well as the averments made by Jeyabalan in all his affidavits asserted that it had always been agreed by the parties at the negotiation stage that upon payment of a sum of RM100,000 as purchase price of the fixtures and fittings installed in the said premises the plaintiff would have the option to purchase the said premises free from all encumbrances at the market price to be determined by a reputable professional valuer. It is further asserted that the defendants requested that a sum of RM50,000 should be paid in cash and which would not be recorded in the tenancy agreement and the remaining RM50,000 would be paid by five equal monthly instalments. Upon the plaintiff exercising the option to purchase, the defendants would give the plaintiff credit equivalent to the said sum. It is also the case for the plaintiff that the premises was let to it as tenant for a term of 5 years certain at a rental of RM6,500 per mensem for the first 2 years and at RM7,500 per mensem for the remaining 3-year period commencing from the date of handing over of vacant possession that is to say from 16 November 1990 with an option to renew and also an option to purchase as stated above. It cannot be gainsaid that the issue as adumbrated above certainly cannot be resolved at this summary stage particularly when one looks at the tenancy agreement be it 'ALSL-2' or 'JB-1' one can see that it clearly shows that:

(a) Clause 4 sets out the terms and rent of the said premises which are consistent with the assertions of the plaintiff as adumbrated above;
(b) Clause 9 sets out the renewed term which again is consistent with what the plaintiff had asserted;
(c) Finally the fourth paragraph of clause 11 entitled **Option To Purchase** reads:

> On completion of the sale and purchase of the demised premises to the tenant, the landlord shall give the tenant credit equivalent to the said sum.
>
> This term again leans in favour of the assertion of the plaintiff.

It is therefore clear from the affidavit evidence adduced at the summary proceeding that the plaintiff has a reasonably good cause of action in that it has raised yet another serious question that could only be answered after the trial of the substantive case. This proposition is reinforced with yet a third issue which is as follows. There is no doubt that the plaintiff had paid a sum of RM$50,000 well before 16 October 1990. In doing so the plaintiff has complied fully with the request of the second defendant for payment of RM50,000 in cash which should not be recorded. Likewise the plaintiff has also complied with clause 10 by sending through its solicitors on 30 October 1990 5 cheques of RM10,000 each in payment of the monthly instalments of the remaining RM$50,000. Hence no matter how one chooses to scrutinise the case for the plaintiff at this stage the result is the same - the plaintiff has *prima facie* carried out its obligations. Now in adverting to the case for the defence, I regret to say that the assertions of the second defendant find no support from the evidence adduced at this summary proceeding. Thus her assertion that the plaintiff was obliged to pay RM100,000 as inducement for her consent to sublet the said premises to the plaintiff and another payment of RM50,000 as compensation for the first defendant in respect of the fixtures and fittings installed in the said premises is not mentioned at all in the tenancy agreement produced by the defendants as exhibit 'ALSL-2 ' or the one produced by the plaintiff as exhibit 'JB-1'. There is also no mention in the said tenancy agreement that the said premises is to be let out on a sub-tenancy basis. Under the circumstances I must reiterate that the plaintiff has a good cause of

action at least at this summary stage. Whether or not the contentions of the defendants can be substained can only be resolved when this case goes on trial.

There is one final matter which I should mention. The plaintiff averred in the affidavit of Jeyabalan that the plaintiff entered into the tenancy agreement of the said premises mainly because of its strategic location which is of great advantage to the business of the plaintiff. This has not been seriously challenged by the defendants. For this reason it is therefore contended that damages cannot be an adequate remedy. To this proposition I agree. There is also no suggestion that should the plaintiff ultimately fail to sustain his right to the injunction they would be in no position to honour their undertaking to pay damages.

For the above reasons I am satisfied that the interim injunction granted to the plaintiff should not be revoked in order to give effect to the maintenance of the *status quo* pending the trial - see *Gan Realty Sdn. Bhd. & Ors. v. Nicholas* [1969] 2 MLJ 110, *Yeap Mah Ee v. Kuan Kim Chiew & Anor.* [1988] 2 MLJ 389 and *Associated Tractors Sdn. Bhd. v. Chan Boon Heng & Anor.* [1990] 2 MLJ 408. The application of the defendants to strike out the writ of the plaintiff is likewise dismissed.

Costs of the proceedings are to be paid by the defendants to the plaintiff.

WAGON ENGINEERING SDN. BHD.

v.

SULAIMAN BULON SEMENANJONG ENTERPRISE SDN. BHD.

HIGH COURT, KUALA LUMPUR
DATO' SITI NORMA YAAKOB J.
[CIVIL SUIT NO. C23-2918-86]
21 NOVEMBER 1992

CONTRACT: Claim for breach of contract - Whether contract valid - Order form signed - No ambiguity in terms - Whether defendant entitled to cancel purchase - Measure of loss - Whether reasonable.

The plaintiff sued the defendant for losses suffered as a result of the defendants refusal to take delivery of five units of bulk cement tankers which had been specifically fabricated by the plaintiff in accordance with the defendant's specifications.

The terms of the contract was evidenced by the plaintiff's order form which was signed by the General Manager of the Transport Division of the defendant's parent company (PW2) and the plaintiffs' Sales Manager.

Upon the defendant's breach, the plaintiffs sold the tankers to mitigate their losses and sued for the difference between the contract price and the sale price.

The defendant claimed, firstly, that PW2 had no authority to sign the Order Form and, secondly, that the loss suffered by the plaintiff was unreasonable.

Held:

[1] PW2 was the officer in charge of the defendant and there was no merit to the defendants' allegation that PW2 had no authority to sign the Order Form.

[2] The contract was completed once the defendant signed the Order Form which described in great detail the equipments to be purchased, the price agreed and mode of payment. The defendant's failure to take delivery was a breach of contract.

[3] The plaintiff had done everything possible to mitigate their losses and the amount claimed was fair and reasonable.

[Plaintiffs claim allowed with costs].